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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 409

THE BOARD OF EDUCATION OF THE LITTLE ROCK SCHOOL DISTRICT, *et al.*,

Petitioners,

—v.—

DELORES CLARK, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

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Citation to Opinions Below

The opinion of the Court of Appeals issued May 13, 1970, of which review is sought by Petitioners, is not yet reported; it is appended to the Petition at pp. A-1 to A-25. The opinion of the district court was unreported and appears as an Appendix to the Petition, pp. A-27 to A-57.

Prior reported opinions in this case and its predecessor action[1] appear as follows: *Aaron* v. *Cooper,* 143 F. Supp. 855 (E.D. Ark. 1956), *aff'd* 243 F.2d 361 (8th Cir. 1957);

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[1] The district court and the Court of Appeals recognized that *Clark* v. *Board of Educ. of Little Rock* was but the continuation of the original *Aaron* v. *Cooper* suit brought in 1956 to desegregate the Little Rock public schools. See Joint Appendix below, at p. 7; Appendix to Petition for Writ of Certiorari, pp. A-2 to A-3.

2 Race Rel. L. Rep. 934-36; 938-41 (E.D. Ark. 1957), *aff'd* 254 F.2d 808 (8th Cir. 1958); 156 F.Supp. 220 (E.D. Ark. 1957), *aff'd sub nom. Faubus* v. *United States,* 254 F.2d 797 (8th Cir. 1958); 163 F. Supp. 13 (E.D. Ark), *rev'd* 257 F.2d 33 (8th Cir.), *aff'd* 358 U.S. 1 (1958); 261 F.2d 97 (8th Cir. 1958); 169 F. Supp. 325 (E.D. Ark. 1959); *Aaron* v. *McKinley,* 173 F. Supp. 944 (E.D. Ark.), *aff'd sub nom. Faubus* v. *Aaron,* 361 U.S. 197 (1959); *Aaron* v. *Tucker,* 186 F. Supp. 913 (E.D. Ark. 1960), *rev'd sub nom. Norwood* v. *Tucker,* 287 F.2d 798 (8th Cir. 1961); *Clark* v. *Board of Educ. of Little Rock,* 369 F.2d 661 (8th Cir. 1966).

Jurisdiction

The jurisdictional prerequisites are adequately set forth in the Petition for Writ of Certiorari.

Questions Presented

Respondents are unable to agree that the five "Questions Presented" in the Petition for Writ of Certiorari at pp. 4-5 appropriately describe the issues posed by this litigation. Each of the "Questions Presented" described by Petitioners *assumes* "fairly drawn attendance zones" although respondents contended, and the Court below found, that in the context of the forms discrimination and school segregation took in Little Rock, the school board's zoning plan was not fairly or constitutionally drawn.

The following statement of the Questions Presented is adapted from Respondents' brief in the Court of Appeals:

1. Does a school district formerly segregated by law fulfill its constitutional obligation to convert to a unitary system by adopting an assignment plan which conforms to racial residential patterns and which fails

to appreciably alter the pattern of racially separate school attendance characteristic of the dual system?

2. Can such an assignment plan be justified on the ground that it is a "neighborhood school" plan where the school district formerly assigned students to schools outside their "neighborhoods" in order to preserve segregation?

3. Can such an assignment plan be justified on the ground that changing the segregated attendance patterns in the public schools of the district may require the expenditure of funds to provide pupil transportation?

Statement

The Petition for Writ of Certiorari does not contain a reasonably detailed statement of the facts, the pleadings, or the desegregation plans presented to the district court; petitioners do not substantially rely upon the facts of record as grounds for review. Yet the decision of the Court of Appeals is founded upon an assessment of the practical effects of the zoning plan in the light of the history of desegregation or the lack thereof, in this district since 1954, and not upon abstract discussions of "racial balance." See Appendix to Petition for Writ of Certiorari, pp. A-13, to A-16. Accordingly, and in view of the lengthy record, we think it appropriate to make available to the Court the following detailed recitation of the facts adapted from our Brief in the Court of Appeals.[2]

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[2] We have also reprinted as an Appendix to this Brief some of the trial exhibits reprinted in our Court of Appeals brief. The parties agreed that the joint Appendix would contain only the pleadings and the transcript but that either party might put before the Court of Appeals in the form of an appendix to its brief, such trial exhibits as it desired.

The current proceedings[3] were formally commenced in Juy 1968 with the filing of a Motion for Further Relief

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[3] After *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954), the Little Rock school board adopted a plan of very gradual integration. When that plan was not implemented, Negro students and their parents brought suit in 1956. The initial plan, calling for complete desegregation by 1963, was approved by the district court that year, *Aaron* v. *Cooper*, 143 F. Supp. 855 (E.D. Ark. 1956). The Court of Appeals rejected arguments that more rapid desegregation should be required, in part for the reason that the first plan had been voluntarily adopted by the school board even before the second *Brown* decision (*Brown* v. *Board of Educ.*, 349 U.S. 294 (1955)). *Aaron* v. *Cooper*, 243 F.2d 361 (8th Cir. 1957). Subsequently, when white parents obtained a state injunction to prevent implementation of the plan in 1957-58, the district court restrained compliance with the order of the Arkansas court and mandated execution of the plan. *Aaron* v. *Cooper*, 2 Race Rel. L. Rep. 934-36, 938-41 (E.D. Ark. 1957), *aff'd* 254 F.2d 808 (8th Cir. 1958). The Governor of Arkansas then took measures to prevent Negroes from attending classes at the previously-white Central High School, including the stationing of National Guardsmen with fixed bayonets at the school with orders to prevent the entry of Negro students. This conduct was enjoined in *Aaron* v. *Cooper*, 156 F. Supp. 220 (E.D. Ark. 1957) *aff'd sub nom. Faubus* v. *United States*, 254 F.2d 797 (8th Cir. 1958). However, intervention by federal troops under direct order of the President of the United States was required to effectuate compliance with the district court's orders and with the Constitution. *Cooper* v. *Aaron*, 358 U.S. 1, 12 (1958).

After the conclusion of the 1957-58 school year, the board sought to delay implementation of the plan for at least three additional years because of the extent of white opposition to integration. The district court's order approving a delay, *Aaron* v. *Cooper*, 163 F. Supp. 13 (E.D. Ark. 1958), *cert. denied*, 357 U.S. 566 (1958), was reversed, 257 F.2d 33 (8th Cir. 1958), *aff'd sub nom. Cooper* v. *Aaron*, 358 U.S. 1 (1958).

Pursuant to emergency measures passed by the Arkansas Legislature in special session, the Governor of Arkansas then ordered all Little Rock high schools [the desegregation plan at that time extended only to the high school grades] to be closed indefinitely. Thereupon, the board undertook to lease its high school buildings to a segregated private school corporation. The district court denied an injunction against the leasing of the facilities, but the Court of Appeals reversed and required issuance of the decree, *Aaron* v. *Cooper*, 261 F.2d 97 (8th Cir. 1958). However, Little Rock public high schools remained closed during the 1958-59 school year, see

based upon *Green* v. *County School Board of New Kent County, Virginia*, 391 U.S. 430 (1968) and companion cases. In that Motion (A. 5a-14a),[4] plaintiffs sought—and plaintiff-intervenors sought in their Complaint (see A. 27a-31a) —an order requiring the Little Rock School District to abandon its free choice plan of desegregation and to adopt and implement a plan of desegregation which "promises realistically" to convert now to a unitary school system.

Aaron v. *Cooper*, 169 F. Supp. 325 (E.D. Ark. 1959), until the Arkansas school closing legislation was declared void by a three-judge district court in *Aaron* v. *McKinley*, 173 F. Supp. 944 (E.D. Ark. 1959) (per curiam), *aff'd sub nom. Faubus* v. *Aaron*, 361 U.S. 197 (1959).

The board then assigned pupils during the 1959-60 school year on the basis of regulations adopted by it pursuant to the Arkansas Pupil Placement laws, which required consideration of a multitude of factors other than residence (*e.g.*, "the possibility of breaches of the peace or ill will or economic retaliation within the community"). An attack upon these laws was rejected by the district court, *Aaron* v. *Tucker*, 186 F. Supp. 913 (E.D. Ark. 1960), but its judgment was reversed in *Norwood* v. *Tucker*, 287 F.2d 798, 802 (8th Cir. 1961), where the Court said, "[w]hile we are convinced that assignment on the basis of pupil residence was contemplated under the original plan of integration, it does not follow that the school officials are powerless to apply additional criteria in making initial assignments and re-assignments." The board's use of the pupil placement laws was "motivated and governed by racial considerations," *id.* at 806, said the Court, and the board's "obligation to disestablish imposed segregation is not met by applying placement or assignment standards, educational theories or other criteria so as to produce the result of leaving the previous racial situation existing as it was before." *Id.* at 809.

The *Clark* plaintiffs in 1965 complained of continued manipulation of the Pupil Placement laws to limit the movement of Negroes into previously all-white schools. The district court so found. See *Clark* v. *Board of Educ. of Little Rock*, 369 F.2d 661, 665 (8th Cir. 1966). While the district court's opinion in that case was being prepared, the board determined to abandon the Pupil Placement laws in favor of a "freedom of choice" plan, subsequently approved by the district court and by the Eighth Circuit with certain directed modifications. *Clark* v. *Board of Educ. of Little Rock, supra.*

[4] Citations are to the Joint Appendix below.

After further proceedings, the district court approved a geographic zoning plan submitted by the board.

The Little Rock School District

At the present time there are five high schools, seven junior high schools, and thirty-one elementary schools (Defendants' Exhibit No. 24, p. 1a *infra*)[5] in the Little Rock School District, which served an estimated 1969-70 student enrollment of 15,377 white students and 8,281 Negro students (Defendants' Exhibit No. 25, p. 3a *infra*). As the Court of Appeals noted in its opinion (See Appendix to Petition for Writ of Certiorari, p. A-6), the district generally forms an irregular rectangle with the longer side running from east to west along the Arkansas River. The most prominent exception to this pattern is the extension of the district in two finger-like projections at its northwest end. These have resulted from the district's annexation, since 1956, of the white residential subdivisions of Walton Heights and Candlewood. Between the two "fingers" lies a Negro residential area known as Pankey (A. 485-509).

Since 1956 the district has expanded almost exclusively to the west.[6] Of thirteen new school facilities opened since

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[5] See note 2 *supra*.

[6] Expansion of the district has not benefited both white and Negro citizens of Little Rock. Various urban renewal projects since 1954 have eliminated areas of Negro residences near the present Hall High School (A. 289), and in Pulaski Heights (A. 290-91). Of more than one hundred and seventy-five subdivisions developed in Little Rock between 1950 and 1968 (Plaintiffs' Exhibit No. 4), only two—Granite Mountain and University Park—have Negro residents (A. 746). On the other hand, William Meeks, a member of the Little Rock School Board and Little Rock "Realtor of the Year" in 1967, testified of discrimination against Negroes in the sale of housing (A. 743-44). He said that he knew of no Little

that year, only three have been located in the east-central section of the city: Booker Jr. High, Ish and Gillam Elementary Schools. All were named for prominent Negroes (A. 473, 482); all were initially opened as Negro schools (A. 473, 477, 482) with all-Negro faculties (*Ibid*).

On the other hand, the district built nine schools[7] in Western Little Rock between 1956 and 1969: Parkview High School, Henderson Junior High and Southwest Junior High Schools, Bale, McDermott, Romine, Terry, Western Hills and Williams Elementary Schools. In each instance, these schools were initially filled with an all-white faculty (A. 154) and they have remained identifiable as "white" schools.

The district court accepted "as obvious the proposition that the Little Rock District located new schools in the center of concentrations of one race and limited the capacities of those schools to service only that particular community" (A. 155-56). Faculty assignments to these schools were then based on the racial composition of the neighborhood (A. 153). Schools built since 1956 have been either nearly all-white or all-Negro (A. 152); they have been located so as to promote desegregation and achievement of a unitary school system (A. 476, 486, 508), although the district has been aware since 1956 of the trend of population movement, including the tendency of whites to move

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Rock realtor, even up to the time of the hearing in this case, who would knowingly sell a lot in a "white" subdivision to a Negro (A. 294). Newspaper advertisements reflecting listings of sale property by race were also introduced in evidence (Plaintiffs' Exhibit No. 3).

[7] The thirteenth facility opened since 1956 was Metropolitan High School, a vocational-technical school serving both Little Rock and the Pulaski County Special School District. It is located outside the district's boundaries.

west and of Negroes to remain in the center or eastern section of the city (A. 286-296, 637).[8]

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[8] Between 1956 and 1969 there were many instances of specific actions taken by the district which developed or reinforced the racial identifiability of its schools:

Bale and Williams Elementary schools were constructed prior to 1961 in all-white neighborhoods and staffed with all-white facilities.

In 1961, the district decided to "convert" the previously all-white Rightsell elementary school to an all-Negro school in order to relieve overcrowding at nearby all-Negro elementary schools. No consideration was given to the possibility of operating all schools in the area on an integrated basis (A. 166-67; *Safferstone* v. *Tucker*, 235 Ark. 70, 357 S.W. 2d 3 (1962)).

In 1963-64, while Henderson Junior High School was under construction, white pupils living in the far western section of the city were transported by school district bus past West Side and Dunbar Junior High Schools to attend the previously all-white East Side Junior High (A. 171). No attempt was made to bus these students to the nearest "neighborhood school" and/or to integrate Dunbar. When construction of Booker Jr. High was completed and East Side closed, however, only the Negro East Side students were assigned to Booker; the white students went to West Side (A. 478). Booker also drew students from overcrowded Dunbar Jr. High (A. 496). Thus, the district did not make use of an opportunity presented to it in 1964-65 to disestablish the identities of West Side and Henderson as white junior high schools and Booker and Dunbar as Negro junior high schools.

In 1963-64 the district opened Gillam Elementary School, located in an all-Negro area, as a Negro school with an all-Negro faculty (A. 473). Gillam was constructed nearly adjacent to the existing Negro Granite Mountain Elementary School. Both schools are presently operating under capacity, but when the district contemplated construction of Gillam, no consideration was given either to expanding existing capacity at other elementary schools or to locating a new facility so as to promote desegregation (A. 474).

In 1965 another primary school named for a Negro citizen was opened with an all-Negro faculty—Ish Elementary School (A. 481-82). At the same time, all-Negro Capital Hill Elementary School was closed and its students assigned to other all-Negro schools, including Ish, rather than to nearby white elementary facilities (A. 482). Although the district was supposed to be operating under freedom of choice at the time, see *Clark* v. *Board of Educ. of Little Rock*, *supra*, 369 F.2d at 665, students assigned to Ish were not afforded a choice of schools until the district was ordered to permit

The Oregon and Parsons Plans

In 1966, the school board contracted with a team from the University of Oregon to prepare a long range plan of desegregation for the district (A. 61-62). The findings of that team were reported in early 1967 and became known as the "Oregon Report" (Defendants' Exhibit No. 7). Ba-

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choice in *Byrd* v. *Board of Directors of Little Rock School Dist.*, Civ. No. LR 65-C-142 (E.D. Ark. 1965).

When all-Negro Pfeifer and Carver schools became overcrowded, the district did not offer Negro students a second choice of schools (A. 315-16), but moved portable classrooms to the site to expand the capacity of the schools and contain the Negro student population (A. 498-99). In contrast, Hall High School was declared overcrowded under the freedom-of-choice plan, necessitating the establishment of an attendance zone. However, when the board drew the zone it made no attempt to maximize desegregation in the school (A. 222-23).

In addition to staffing new schools with all-white or all-Negro faculties, the district hired teachers on a strictly racial basis through 1964-65 (A. 28); thereafter, all attempts to achieve faculty integration were on a purely voluntary basis only (A. 255). And prior to July 1968, except for two white principals at Negro schools, the district maintained a racial allocation of principalships, with white principals at traditionally white schools and Negro principals at "Negro" schools (A. 121-22).

In 1966, the district purchased a school site in Pleasant Valley, an exclusively white upper-middle class subdivision (Defendants' Exhibit No. 30; A. 213, 485), again without any consideration of the racial composition of the neighborhood or the past history of segregation (A. 486). Any school constructed on the site (there is still a sign announcing that a school will be built on the site) would be all-white; were Pleasant Valley, Walton Heights and Candlewood subdivisions not within the Little Rock district, the closest school would be a predominantly Negro school in the Pankey area (A. 488-89).

Finally,—and this list is by no means exhaustive of the means by which this district maintained the segregated character of its system—the school district undertook to build a new senior high school (Parkview) in the far western section of the city in 1967 despite the availability of over four hundred vacant classroom spaces at Horace Mann High School (A. 144-45). Three high schools could still serve the high school population of the district (A. 131); the overcrowding at the time was in junior high schools (A. 617-18).

sically, the report recommended abandonment of the neighborhood school concept and restructuring of the district's schools through a capital building program combined with pairing to create an educational park system (*Ibid*). The cost of implementing the "Oregon Report" in its entirety was estimated to be some ten million dollars; however, as the chief author and director of the study (Dr. Goldhammer) explained, much of this amount would have had to be expended for building replacement and remodeling anyway (A. 367). The Oregon Report would also have required a transportation system for the school district (*Ibid*).

Following issuance of the Oregon Report, a school board election was held in November 1967. Two incumbent members of the board who supported the recommendations of the Oregon Report were replaced by candidates who campaigned against it (A. 416-18), and the vote was interpreted as an indication (a) that the public would not support implementation of the recommendations, and (b) that the public would not vote bond monies or tax levies sufficient to implement them.

The school board then directed the Superintendent and his staff to prepare their own recommendations of a desegregation plan for Little Rock (A. 69). The Superintendent's proposals quickly became known as the "Parsons Plan" (A. 70). The Parsons Plan proposed measures to desegregate Little Rock high schools and two groups of elementary schools, but made no proposals for other elementary schools or for junior highs. In March 1968, the board placed a $5 million bond issue for implementing the Parsons Plan on the ballot (A. 73-74). The millage increase for the bonds was rejected (A. 75) and again, candidates favoring no change in the status quo defeated incumbents who supported the Superintendent's plan (A. 180-81. See also, A. 417-21).

Development of the Plan Rejected by the Court of Appeals

After the school district had responded to the Motion for Further Relief, the district court set a hearing for August 15, 1968 and suggested that the Board devise a geographic zoning plan (A. 32a). The district did present a geographic attendance zone plan at the August hearing (A. 76). However, this plan was characterized as an "interim" measure (A. 320) which required further study (A. 91); the district opposed making any change from freedom-of-choice for 1968-69 and the hearing was limited to whether or not a shift ought to be required for 1968-69. After the second day of testimony, the hearing was recessed in order to allow the district to develop and present a final plan to completely disestablish the dual system effective with the 1968-70 school year (A. 403-04). That plan was submitted November 15, 1968 (A. 405d-405g).

Although cost was a major factor in the decision to submit a zoning plan, no cost analysis of various alternative approaches was ever requested or made (A. 513-14, 548-49).

The plan of the school board established mandatory attendance areas for all schools except the district-wide vocational-technical facility, Metropolitan High School. The zones were approved as submitted except that the district court required (A. 912-13) that the Hall High School zone be redrawn in accordance with the October 10th proposal of the Superintendent putting 80 Negro students in Hall High School (which had been rejected by the Board).

The results under the two zoning plans and the past enrollments at Little Rock schools are shown in the following table:

TABLE 1

School	(Segregation) 1956 Enrollment W	N	(Pupil Placement) 1960-61 Enrollment W	N	(Limited Free Choice) 1964-65 Enrollment W	N	(Free Choice) 1968-69 Enrollment W	N	(Aaron) Zones 1956 Plan W	N	(Clark I) Zones 1965 Plan W	N	(Clark II) Zones 8/68 Plan W	N	Zones 11/68 Plan W	N	Faculty Assignments 11/68 Plan W %	N %
HIGH SCHOOLS																		
White:																		
Central	2475	0	1686	7	2206	76	1542	512	2107	337	2005	210	1249	644	1447	481	85	15
Hall	---	---	884	5	1540	18	1436	4	835	0	1458	60	1408	3	1361	4	84	16
Parkview	---	---	---	---	---	---	519	46	---	---	---	---	863	56	729	52	84	16
Negro:																		
Mann	0	582	0	821	0	1239	0	801	363	413	359	1065	233	912	66	978	71	29
JR. HIGH SCHOOLS																		
White:																		
East Side	852	0	606	0	---	---	---	---	355	255	---	---	---	---	---	---	--	--
West Side	1268	0	1006	0	947	36	657	318	807	283	252	738	471	398	495	395	80	20
Pulaski Heights	483	0	880	0	800	12	613	36	644	40	779	39	672	65	649	56	78	22
Forest Heights	678	0	854	0	975	4	1040	8	760	0	937	1	908	0	904	4	81	19
Henderson	---	---	---	---	452	4	822	16	---	---	683	66	808	2	813	0	79	21
Southwest	---	---	938	0	994	2	987	27	866	54	966	42	859	62	914	41	80	20

TABLE 1 (continued)

School	(Segregation) 1956 Enrol-lment W	N	(Pupil Placement) 1960-61 Enrol-lment W	N	(Limited Free Choice) 1964-65 Enrol-lment W	N	(Free Choice) 1968-69 Enrol-lment W	N	(Aaron) Zones 1956 Plan W	N	(Clark I) Zones 1965 Plan W	N	(Clark II) Zones 8/68 Plan W	N	Zones 11/68 Plan W	N	Faculty Assignments 11/68 Plan W %	N %
JR. HIGH SCHOOLS																		
Negro:																		
Dunbar	0	1053	0	1407	0	952	0	685	283	717	289	664	79	800	27	741	57	43
Booker	---	---	0	669	0	756	0	703	---	---	252	738	136	705	89	747	56	44
ELEMENTARY SCHOOLS																		
White:																		
Bale			442	0	508	0	501	3			349	0	461	11	461	11	67	33
Brady			485	0	669	0	669	1			657	0	665	0	665	0	68	32
Centennial			283	0	306	10	138	202			217	29	129	149	109	231	57	43
Fair Park			354	0	266	0	253	0			208	0	227	0	227	0	67	33
Forest Park			532	0	544	0	383	2			451	0	370	1	370	1	71	29
Franklin			706	0	649	0	511	11			607	56	526	61	526	61	72	28
Garland			437	0	371	0	283	15			263	1	213	7	260	62	71	28
Jackson			246	0	278	3	---	---			250	89	---	---	---	---	--	--
Jefferson			672	0	612	0	513	0			623	0	534	0	534	0	71	29
Kramer			347	0	283	0	91	76			139	63	118	95	78	70	63	37
Lee			433	0	376	2	210	155			267	14	218	70	219	70	62	38

School	(Segregation) 1956 Enrollment W	N	(Pupil Placement) 1960-61 Enrollment W	N	(Limited Free Choice) 1964-65 Enrollment W	N	(Free Choice) 1968-69 Enrollment W	N	(Aaron) Zones 1956 Plan W	N	(Clark I) Zones 1965 Plan W	N	(Clark II) Zones 8/68 Plan W	N	Zones 11/68 Plan W	N	Faculty Assignments 11/68 Plan W %	N %
ELEMENTARY SCHOOLS																		
White:																		
McDermott	---	---	---	---	---	---	448	1	---	---	---	---	414	0	412	0	69	31
Meadowcliff			429	0 [1]	499	0	579	0			485	0	553	0	553	0	73	27
Mitchell			379	0	355	27	41	334			276	25	102	292	97	290	67	33
Oakhurst			473	0	396	2	281	53			360	31	330	24	330	24	69	31
Parham			438	0	407	0	270	81			209	130	187	154	199	161	71	29
Pulaski Heights			569	0	500	0	446	5			450	7	333	0	333	0	69	31
Romine			336	0	481	7	316	97			435	86	380	100	380	100	72	28
Terry			---	---	267	0	490	0			242	0	442	0	442	0	72	28
Western Hills			---	---	178	12 [11]	206	6			---	---	204	0	204	0	67	33
Williams			423	0	615	0	745	6			592	2	616	3	616	3	67	33
Wilson			843	0	551	10	411	77			521	11	437	46	437	46	70	30
Woodruff			329	0	328	2	212	62			235	0	216	18	232	46	70	30
Negro:																		
Bush			0	196	0	199	0	113			---	---	---	---	---	---	--	--
Capital Hill			0	457	0	237	---	---			---	---	---	---	---	---	--	--

TABLE 1 (continued)

School	(Segregation) 1956 Enrollment W	N	(Pupil Placement) 1960-61 Enrollment W	N	(Limited Free Choice) 1964-65 Enrollment W	N	(Free Choice) 1968-69 Enrollment W	N	(Aaron) Zones 1956 Plan W	N	(Clark I) Zones 1965 Plan W	N	(Clark II) Zones 8/68 Plan W	N	Zones 11/68 Plan W	N	Faculty Assignments 11/68 Plan W %	N %
ELEMENTARY SCHOOLS																		
Negro:																		
Carver			0	785	0	904	0	842			284	731 [1]	16	794	16	794	56	44
Gibbs			0	839	0	497	0	390			70	289	20	317	48	389	56	44
Gillam			0	188 [2]	0	185	0	213			---	---	18	141	18	141	56	44
Ish			---	---	0	587 [3]	0	589			391	355	13	606	8	484	56	44
Granite Mountain			0	557	0	476	0	466			12	614	0	471	0	471	59	41
Pfeifer			0	136	0	178	0	190			284	731 [4]	14	141	14	141	57	43
Rightsell			0	373	0	901	0	390			109	329	51	394	54	390	56	44
Stephens			0	486	0	582	0	369			145	369	83	365	3[illegible]	313	57	43
Washington			0	538	0	580	0	506			44	499	10	505	7	483	58	42

[1] Including Technical High School students
[2] Initial Enrollment 1966-67
[3] Initial Enrollment 1963-64
[4] Carver-Pfeifer
[5] Initial Enrollment 1961-62
[6] Initial Enrollment 1965-66

Fewer Negro students would attend predominantly white schools under the zoning plan than had been enrolled in such schools under freedom of choice (A. 534-35); there would be "very little" integration under the zoning plan (A. 162) since the zones were drawn in a manner that allowed schools to remain all-white and all-Negro (see A. 434).

Most of the witnesses at the hearing agreed that the Parsons Plan was a better integration plan, albeit incomplete, than the board's zoning proposal (A. 129 [superintendent Parsons], 194 [Board President Barron], 298-99 [Board member Meeks], 678 [Dr. Dodson], 819 [Dr. Goldhammer, principal author of the Oregon Report]). The Superintendent also testified that various zones drawn in the board's plan, such as those for Gillam Elementary and Hall High Schools, did not further the goal of integration (A. 158). From his study of the board's proposals, Dr. Goldhammer concluded that they did not provide for a unitary school system, and would not be an improvement over free choice (A. 381-82).

Alternatives Available to the District

Plaintiffs' expert witness Dr. Dodson said that the zones froze in the segregated character which the schools had developed in the past (A. 686). He recommended implementation of a plan not based on the neighborhood school concept (A. 673-74). He traced the origin of the concept to the "common school" notion at the base of public education (A. 658-59) but said that the neighborhood school had become "a place where people who are more privileged try to hide . . . and it's been made sacred in recent thinking about in proportion as Negroes get close to it. It has become an exclusive device, that is the opposite of the com-

munity school" (A. 659). Dr. Dodson pointed out that in a city with racially segregated housing patterns, effective desegregation could not be accomplished if the neighborhood school concept were adhered to (A. 673-74). Only by eliminating the racial identities of the schools and allowing them to take on new identities as common schools could an integrated unitary system be achieved (A. 681-82). He discussed alternative approaches used in other districts (A. 674-76). He was of the opinion that if Little Rock's high schools were to be zoned to desegregate them, the zones should have been drawn from east to west as in the Parsons Plan (A. 678).

Dr. Goldhammer testified that the initial study of the Little Rock School District by the team which drafted the Oregon Report demonstrated that the district's progress in eliminating the dual system was much slower than could have been expected; that considering the rapid growth in enrollment in the school system, free choice would never have worked (A. 357-59).[9] Whereas the board's plan proposed to zone all schools, the University of Oregon team had concluded that in a residentially segregated community such as Little Rock, no single approach would do the entire job of conversion to a unitary system (A. 365). The Oregon team's recommendations therefore incorporated several different features: a capital construction program to develop educational parks and larger attendance centers, pairing some schools and a busing system of student transportation (A. 365-67). Although the report carried a cost estimate of $10 million, this price included considerable replacement or modernization of facilities which would have had to be carried out irrespective of any desegrega-

[9] Superintendent Parsons stated that *he* had never expected white students to choose identifiably Negro schools under freedom of choice (A. 330-31).

tion plan (A. 367). The cost of coming as close to the Report as possible without abandoning or remodeling buildings would require less than $500 thousand, for busing, inservice training and compensatory education programs (A. 368-69).

Dr. Goldhammer said that the Parsons Plan, the Oregon Report and the "Walker"[10] plan were each better means of desegregating the schools than the board's zoning proposals (A. 399, 819). (He estimated that the "Walker" plan would be the least expensive to implement, [illegible]. 821). The Board President, also, was of the opinion that these plans would result in more integration in the Little Rock public schools than would be accomplished under the zoning plan. They would thus eliminate the racial identifiability of the schools, something which the zoning plan would fail to achieve (A. 762. See also, A. 298, 636).

The district rejected these alternatives because they each required expenditure of funds which Little Rock voters had demonstrated, by their votes on the bond issues, that they would not provide (A. 334, 337-40, 415-23, 428, 456, 653-54). The Superintendent said, in fact, that the community had "turned down every educationally desirable plan and now we are left with only zoning as a feasible plan" (A. 556-557). Some funds were available to the district, however, including State monies for a transportation system (A. 341-43, 641-46) and Dr. Goldhammer suggested that funds might have to be diverted in order to accomplish unification of the system (A. 821).

The District Court approved the Board's zoning plan. The Court of Appeals held that action was error.

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[10] A plan developed by a group of Negro citizens and organizations which combined grade restructuring, pairing and transportation with recommendations for future development of larger, more centralized attendance centers.

ARGUMENT

As we read the Petition, the Little Rock School Board urges review of the decision below on two major grounds: that the Eighth Circuit has required Little Rock to abandon the "neighborhood school" method of assignment, and that the Courts of Appeals are divided in their interpretations of this Court's school desegregation decisions.

Petitioners assert (p. 11) that

> [t]he effect of the majority opinion below is to deny to the Little Rock School District the right to assign its public school students as they are assigned, and have been for decades, by the vast majority of the nation's school districts.

The fact is that "neighborhood schools" have been paid lip service only, and not much more, not only in Little Rock but throughout most of the country. See Weinberg, *Race and Place—A Legal History of the Neighborhood School* (U.S. Gov't Printing Office, Catalogue No. FS 5.238:38005, 1967). When "neighborhood schools" would have meant *integrated schools*, this school system was unwilling to draw geographic attendance zones.

Petitioners correctly state that when this litigation was begun plaintiffs suggested the remedy of attendance zoning. That remedy would have meant desegregation so the school district opposed it while it built white schools in western Little Rock. However, to say, as petitioners do (p. 7), that when zoning was adopted in 1969 "plaintiffs achieved the basic relief they had earlier sought in the suit" is to confuse form with substance. Surely the majority of the Court of Appeals was correct in not assigning any magic value to "neighborhood schools" but investigating whether there would be *integrated* schools.

No other Court of Appeals would have approved the Little Rock plan.[11] In an opinion remarkably similar to that below, for example, the Tenth Circuit has recently held:

> The attendance zones as originally formulated were superimposed upon racially defined neighborhoods and were, therefore, discriminatory from their inception [citing *Brewer* v. *School Bd. of City of Norfolk*, 397 F.2d 37 (4th Cir. 1967)]. . . . Similarly, the pattern of new school construction has preserved, rather than disestablished, the racial homogeny of the Tulsa attendance zones.
>
> As conceived and as historically and currently administered, the Tulsa neighborhood school policy has constituted a system of state-imposed and state-preserved segregation, a continuing legacy of subtle yet effective discrimination.

United States v. *Board of Educ., Independent School Dist. No. 1, Tulsa*, No. 338-69 (10th Cir., July 28, 1970).

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[11] Virtually every district court opinion which petitioners claim (Petition, pp. 13-14) evidences confusion about the meaning of this Court's decisions has been reversed, and appropriate guidelines given by the Courts of Appeals. *Bivins* v. *Bibb County Bd. of Educ.* and *Thomie* v. *Houston County Bd. of Educ.*, No. 29,121 (5th Cir., February 5, 1970); *Hilson* v. *Ouzts*, No. 28491 (5th Cir., April 3, 1970); *United States* v. *State of Georgia*, No. 29067 (5th Cir., June 18, 1970) (permitting intervenors to contest adequacy of desegregation formulas and suggesting their facial invalidity); *Brewer* v. *School Bd. of City of Norfolk*, No. 14,544 (4th Cir., June 22, 1970), *cert. denied*, 38 U.S.L.W. 3522 (June 29, 1970). The *Northcross* decision cited by petitioners was reversed by this Court, 397 U.S. 232 (1970). In *Graves* v. *Board of Educ. of North Little Rock*, where the parties are represented by the same counsel as in this litigation, it was agreed that plaintiffs' appeal be dismissed on the condition that further proceedings in the district court would be governed by the outcome of the *Little Rock* appeal.

The Fourth Circuit since 1968 has consistently held that "neighborhood schools" cannot abort the constitutional imperative. *Brewer* v. *School Bd. of City of Norfolk, supra; Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, No. 14,517 (4th Cir., May 26, 1970), *cert. granted on other issues*, 38 U.S.L.W. 3522 (June 29, 1970).[12]

The Fifth Circuit has approved plans which it views as preserving "neighborhood schools" only where such plans establish unitary school systems; no plan has been approved which results in as little actual desegregation as Little Rock's. *E.g., Ellis* v. *Board of Public Instruction of Orange County,* 423 F.2d 203, 208, n. 7 (5th Cir. 1970) ("Under the facts of this case, it happens that the school board's choice of a neighborhood assignment system is adequate to convert the Orange County school system from a dual to a unitary system"); *Andrews* v. *City of Monroe*, No. 29358 (5th Cir., April 23, 1970) (typewritten slip opinion at p. 4: "However, we do not reject the School Board's plan solely on the ground that it does not fit the *Orange County* definition of a 'neighborhood' system. Even if, as presently constituted, the plan were a true neighborhood plan, we would reject it because it fails to establish a unitary sys-

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[12] "The District Court should not tolerate any new scheme or 'principle,' however characterized, that is erected upon and has the effect of preserving the dual system. This applies to the 'neighborhood school' concept, a shibboleth decisively rejected by this court in *Swann* (Judge Bryan dissenting), as an impediment to the performance of the duty to desegregate. The purely contiguous zoning plan advanced by the Board in that case was rejected by five of the six judges who participated. A new plan for Norfolk that is no more than an overlay of existing residential patterns likewise will not suffice." *Brewer* v. *School Bd. of City of Norfolk*, No. 14,544 (4th Cir., June 22, 1970) (concurring opinion of Sobeloff and Winter, JJ., pp. 1-2), *cert. denied,* 38 U.S.L.W. 3522 (June 29, 1970).

tem."); *Mannings* v. *Board of Public Instruction of Hillsborough County*, No. 28643 (5th Cir., May 11, 1970).[13]

Finally, the Sixth Circuit has recently rejected the argument that zoning is *per se* constitutional.

> The District Court, in examining the record before it, has apparently determined that revision of the attendance zones is necessary to insure the Board's compliance with its affirmative duty to disestablish segregation with a plan which "promises realistically to work *now*." There is nothing in the record, including the failure of the prior reviewing courts to disturb the zoning, which would justify disturbing the District Court's determination. Nor does the absence of a finding that the present zones were racially gerrymandered or that the Board acted in bad faith preclude the District Court from ordering this remedial relief. *Green* v. *County School Board, supra*, at 439; *Jackson* v. *Marvell School District No. 22*, 416 F.2d 380, 385 (8th Cir. 1969); *Henry* v. *Clarksdale Municipal Separate School District*, 409 F.2d 682, 684 (5th Cir.), *cert. denied*, 396 U.S. 940 (1969).
>
> The Board's assertion that the District Court's order requiring revision of the zones was designed to achieve a predetermined racial balance [footnote omitted] in

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[13] In noting our view, based on our reading of the decisions, that none of the Courts of Appeals would have affirmed the district court's acceptance of the Little Rock zoning plan, we do not mean to suggest agreement with the Fourth Circuit's limitation of remedy by its "reasonableness" doctrine, see Petition for Writ of Certiorari. *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, No. 281, O.T. 1970, *cert. granted*, June 29, 1970, 38 U.S.L.W. 3522, or with the Fifth Circuit's use of the "neighborhood school" doctrine to justify a lesser number of segregated schools in a district than Little Rock's plan would have produced, see Petition for Writ of Certiorari, *Davis* v. *Board of School Commr's of Mobile*, No. 436, O.T. 1970.

> the schools in violation of section 407(a)(2) of the Civil Rights Act of 1964 (42 U.S.C. § 2000c-6) is also without merit. . . .

Monroe v. *Board of Comm'rs of Jackson*, No. 19720 (6th Cir., June 19, 1970) (slip opinion at pp. 5-6). See also, *Kelley* v. *Metropolitan County Board of Educ. of Nashville*, Civ. No. 2094 (M.D. Tenn., July 16, 1970).

This matter is best put in its proper perspective by examining what the Court of Appeals *did*, and not what petitioners say it did! Little Rock's plan was not rejected because "several" (Petition, p. 8) schools remained racially identifiable. *Compare* Appendix to Petition, pp. A-15 to A-16, pp. 13-15 *supra*. It was rejected because it effected at most a *de minimus* change in the patterns of racially segregated school attendance which characterized the dual system in Little Rock. All that has been decided is that *"desegregation"* plans which don't work are not constitutional; racial balance has been neither required nor prohibited. The arguments of Petitioners are thus much like those made three years ago by school boards when the Fifth Circuit indicated that free choice plans would not be indefinitely approved if they failed to produce integration. *Caddo Parish School Bd.* v. *United States*, 389 U.S. 940 (1967).

The decision below is completely in accord with the spirit of *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968), where in the context of free choice this Court refused to view any particular *method* of desegregation as sacrosanct, emphasizing instead the *result*. The Court of Appeals properly concluded that "geographic attendance zones . . . must be tested by this same standard." (Appendix to Petition, p. A-14). Petitioners attempt to circumvent application of so pragmatic a test to their zon-

ing plan by interpreting *Brown* v. *Board of Educ.* to have sanctioned attendance zoning for all time.

> This Court in *Brown* recognized geographic districting as the normal method of pupil placement and did not foresee changing it as the result of relief to be granted in that case. . . . the original command of *Brown* that public school systems must operate free from racial classifications has not been altered by this Court's subsequent decisions in the matter. This was confirmed as recently as *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969), in which this Court said it was the constitutional duty of every school district to operate "school systems within which no person is to be effectively excluded from any school because of race or color."

(Petition, pp. 11, 16). Even if this Court in *Brown* had viewed zoning as a sufficient remedy in the cases before it[14] (perhaps in all cases) and had not foreseen changing it, we think it is also fair to say that this Court anticipated compliance with its decision rather than the fourteen years of evasion and continued discriminatory practices which mark this case. "Defendants contend that they have excluded no one from any school, but they are still effectively operating dual schools." *Christian* v. *Board of Educ. of Strong*, Civ. No. ED-68-C-5 (W.D. Ark., Dec. 15, 1969).

One final argument of the Petitioners deserves note. They seek to characterize a school district's choice of the zoning attendance assignment method as an innocent choice, which may produce racially identifiable schools only "[b]ecause of the tendency of the people in this country, north, south, east or west, to reside in those areas of a city populated

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[14] As noted above, geographic zoning in Little Rock in 1956 would have meant desegregation. See p. 19 *supra*.

by other citizens of their race" . . ." This pernicious argument is, first, totally unsupported by any evidence in this record. In fact, this record contains uncontradicted evidence to the contrary concerning racial discrimination which is pervasive in Little Rock (A. 294, 743-44, Plaintiffs' Exhibit No. 3; *cf.* A. 289-91, 746). Second, petitioners' bald assertion is rebutted by innumerable studies by governmental bodies., *Racial Isolation in the Public Schools*, A Report of the U.S. Commission on Civil Rights 201-02, 254, Legal Appendix at 255-56, and private authors, *e.g.*, Abrams, *Forbidden Neighbors* 233 (1955); Weaver, *The Negro Ghetto* 71-73 (1948). Third, it is disproved by recent affirmative action of the Congress, Fair Housing Act of 1968, 42 U.S.C.A. §§ 3601 et seq. (Supp. 1970). Finally, it ignores the very real complicity, through site selection, staffing, etc., of the school district in the existing pattern of racially identifiable schools. See the opinion below, Appendix to Petition, pp. A-15 to A-16, nn. 19-22 and accompanying text. "The question is no longer where the first move must be made in order to accomplish equality within our society; the question has become and possibly always has been who has the power and duty to make those moves so as to advance the accomplishment of that equality." *Davis* v. *School Dist. of City of Pontiac*, 309 F. Supp. 734, 742 (E.D. Mich. 1970).

This case is an inappropriate one for review, then, because (1) there is no difference of opinion between the various Courts of Appeals on the constitutionality of a zoning plan which produces as little real desegregation as Little Rock's; (2) the opinion below neither forbids "neighborhood schools" nor mandates "racial balance" in the public schools—it is the rejection of a specific plan evaluated in the context of the specific factual circumstances of this district; (3) the Court was clearly correct in insisting that

desegregation plans achieve desegregation in order to win judicial approval. This school district's distortion of *Brown* v. *Board of Educ., supra*, is deserving of no less rapid dispatch by this Court than the similarly twisted interpretation of that decision offered by the Norfolk School Board. (Review of the Fourth Circuit's rejection of their theory was denied by this Court one week after the Court of Appeals' decision). At best, this case is one for summary affirmance.

CONCLUSION

WHEREFORE, Respondents respectfully pray in light of the foregoing that the writ be denied.

Respectfully submitted,

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